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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 256

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. McKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS McKENZIE, DECEASED; FAYETTE A. McKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners,*

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

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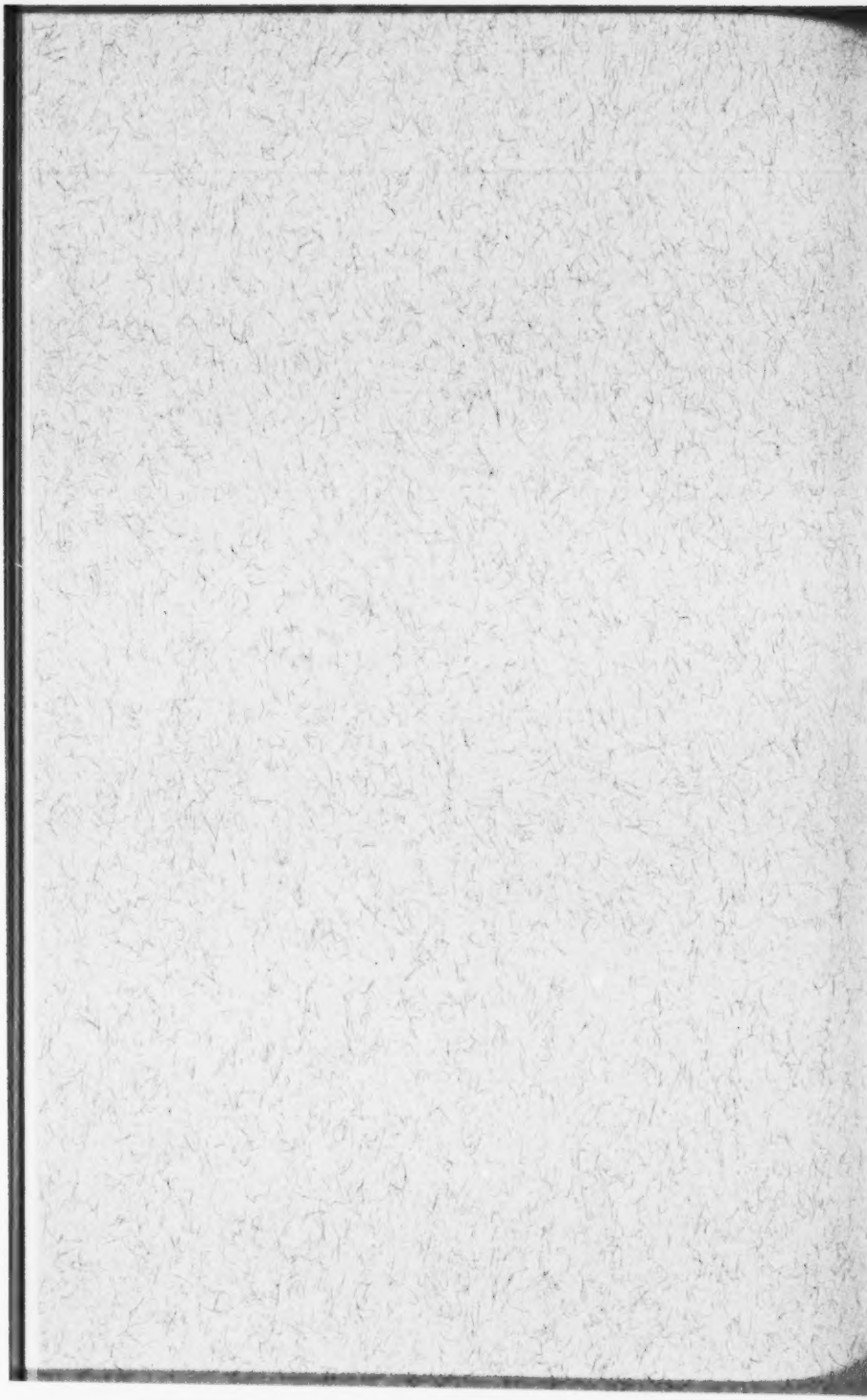

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VS.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

Respondent's Brief charges that the Petition contains "erroneous" statements which "carry a false implication" (Br. 22), and from this premise states what it *implies* is a "Statement of the Case." This charge, coupled with numerous misrepresentations of the record and with a method of argument designed to confuse and mislead this Court, instead of presenting the issues upon Federal questions with "studied accuracy, brevity and clearness" to show "the real situation," as required of "counsel for *both*

sides" in *Furness Withy & Co., Ltd.*, v. *Yang Tsze Insurance Co., Ltd., et al.*, 242 U. S. 430 (433-4), compels petitioners to reply.

Reply to Respondent's Statement of the Case.

Respondent's "Statement of the Case" (Br. p. 3-7) is, with a few misleading characterizations, but a partial statement of the docket entries (R. 1a-10a). It fails to point out any *inaccuracy* or *omission* in the Summary Statement of the Petition as required by Rule 27(4) of this Court, hence by the oblique method employed, tacitly concedes the correctness of the Petition's presentation of facts. The purpose of some of its implications to lay the ground work for further misrepresentations and misleading statements in its "Argument" will be apparent from this Reply to respondent's "Argument."

Reply to Point 1 of Respondent's Argument.

Point 1 is captioned "The Proceedings in the Orphans Court of Tioga County." It consists of a prefatory statement which misrepresents the prescribed procedure and practise (Br. 8), and five sub-heads (a-b-c-d-e, Br. pp. 9 to 17) which, for the most part, do not contain *argument* but merely reiterate with slightly different phrasings the misleading statements previously set forth in its Statement of the Case,[1] and *imply* that they recite the salient facts in the proceedings in administration in this estate relevant to consideration of the Federal questions here. Thus, the method employed is to first give an innocuous statement of the case, then misstate the prescribed procedure and practise, and upon this false premise, to imply by recitals under

[1] Compare: ¶ 3 p. 3 with ¶ 1 p. 9 and note variance in dates re appointment of auditor; ¶ 3 p. 4 with ¶ 4 p. 9 and note variance in dates of second account; ¶ 4 p. 4 with ¶ 5 p. 9; ¶ 5 p. 4 with ¶ 1 p. 10.

the sub-heads, that the steps taken in administration were in accordance with the prescribed procedure and practise.

The prefatory statement (Br. p. 8) cites with care the *Orphans Court Act*, which is the Act dealing with the *subject matter* of such Courts jurisdiction. But it significantly fails to even mention the *Fiduciaries Act*, Act of June 7, 1917, P. L. 447 (Purdon's Statutes, Title 20, Sections 321 et seq.), which is the Act prescribing the proper *procedure* in Orphans Courts. The Rules of Equity Practise of Pennsylvania prescribe the practise in Orphans Courts.

The significance and importance of a correct understanding of the proper procedure as prescribed in the *Fiduciaries Act*, as related to the Federal questions raised in the Petition, relate to steps actually taken in the *initial* proceedings in administration which constitute the *conditions and circumstances* under which the Court later, when construing the residuary clause, took judicial notice contrary to the law of the land. Petitioners' position as set forth in their Petition is that the Court could not take judicial notice as a subterfuge to by-pass the impediment of a recognized rule of law which the Court conceded made evidence inadmissible to establish the alleged fact judicially noticed; and that it could not take judicial notice where there was doubt; and that it could not take judicial notice to establish the main fact in issue; and that by the failure of the sole Judge of the Orphans Court to observe the prescribed procedure and practise in those initial steps in administration taken before petitioners received notice or knew what was being done, the Court conclusively showed that it had great doubts and that it recognized the ambiguity in the residuary clause as *patent*.

Under Section 46(f) of the Fiduciaries Act, the Court was *prohibited* from confirming an account until the *Notice* prescribed in Section 46(e) had been given, and this prohi-

bition applies to all Orphans Courts. Section 46(e) provides:

> "When any of the heirs—reside out of this State—or from other circumstances it may be expedient that additional or further notice (to advertisement) should be given—it shall be in the discretion of the Orphans Court to require such further or additional notice—to appear in Court or before the auditor—for the *examination* of the account or *distribution* of assets."

To exercise this discretion judicially, rather than capriciously, the Court must look into the Will and any other matters disclosed by the files and records in the estate when accounts are *presented*—to ascertain those *basic conditions* inherent in the estate germane to its consideration in discharging the *duties* correlative to the power in exercising discretion as to notice.

The records and files showed that there was a residue of Individual Estate and also a Trust Estate of nearly $400,000.00. *In addition* to the question of ambiguity because of the naked abbreviation in the residuary clause, *other* provisions of the Will and Codicils and the provisions of the Federal Estate Tax Law, *demanded prompt judicial construction of the residuary clause to determine identities of those entitled to residue and trust estate in order that such parties might be heard upon construction of these other provisions and in order to file a lawful return on Federal Estate tax.*

Thus, the Will gave "$25,000 in bonds of good value bearing at least 4%" (R. 10a). This was obviously a gift of bonds at *par,* as ultimately construed (R. 152a-153a). Who had the right of *selection?* The legatee, the executors, or those entitled to residue? Certainly the latter must *be heard* upon the question of who had the right to select. And they must be identified before they could be heard.

The Will gave a $10,000 contingent gift (R. 11a) and a Codicil admonished against payment of excessive Executors' commissions, thus "only the usual single fee" (R. 18a). Construction of both of these provisions directly affected the value of residue, and *whoever* was entitled to residue must be *identified* in order to be *heard* thereon.

So much of the estate as might pass to charity would be exempt in determining net estate subject to Federal Estate tax. Whether the residue and/or trust estate passed to charity would determine both the amount and rate of such tax. Some specific and pecuniary legacies were given tax-free, whereas others were tax-burdened (R. 10a and 20a). And it would be impossible to make distribution on the tax-burdened legacies until the rate of tax was determined.

Thus, it would be impossible for Executors to liquidate any bonds in the Individual Estate (their chief task) or to distribute the contingent legacies, or any of the tax-burdened legacies; or to receive any commissions and the court itself later conceded on exceptions that in order to make a proper and lawful determination on Federal tax or pay such tax, it was "necessary" to have judicial identification of whoever was entitled to residue and trust estate (R. 477).

These were the basic conditions inherent in the estate at death.

The first accounts showed when presented to the Court that most bonds had been liquidated without any selections having been made (R. 43a); that the contingent gift had been paid and was charged to expense (R. 41a) instead of being shown in its proper place under the "distribution account" (R. 42a); and the Court approved the payment by Executors to themselves, before confirmation, of commissions in excess of the established standards, and in face of the admonition against excessive commissions in the first Codicil (R. 18a), all without notice to petitioners.

The distinction concerning large and small counties in the Fiduciaries Act does not relieve a Judge of his duty to see that proper Notice is given upon "presentation" of an account, *before* the account is *examined* in open court, much less confirmed.

These basic conditions here detailed were apprehended in the Petition where it says that construction of the residuary clause was deferred "notwithstanding an early adjudication was *necessary for proper administration*" (Pet. 5). This statement, we submit, in the light of the unquestionable inherent conditions as above delineated, was a modest statement made "with studied accuracy, brevity and clearness." If it were to be challenged by respondent, it should be pointed out definitely instead of resorting to the oblique method of misrepresenting the law upon the proper procedure and practise, thus compelling petitioners here to burden their Reply with such lengthy details.

In reply to sub-head (b) under Point 1, what has already been shown discloses the irregularity of having the proceeding to construe the Will follow, rather than precede, the confirmation of the accounts. The Record discloses that although the other provisions of the Will and Codicils were construed, construction of the residuary clause was deferred (R. 132a-180a) at the request of counsel for Executors (R. 86a-87a), who also appeared for respondent and the other Animal Society claimant (R. 91a-92a), upon the pretext that a Federal Estate Tax Return could not be filed and the tax paid at the time (R. 86a-87a), when in fact on that very day, January 20, 1941 (R. 78a) the Return had been filed and tax thereon paid (R. 212a) by Executors, accompanied by a misleading affidavit (R. 72a and see Instructions 70a-71a) of no contest when they actually knew that two Societies each claimed the residue (R. 91a, 92a).

Under sub-heads (d) and (e) of this section (Br. pp. 10-17) respondent gives its version of the hearings which com-

menced on January 29, 1942, in the Orphans Court. Respondent would have this Court believe that its position was that if the Orphans Court should refuse to take judicial notice that the abbreviation "Penna. S. P. C. A." meant respondent, or that respondent's evidence failed to establish its identity under that abbreviation, that the next-of-kin (petitioners) had no standing to claim the residuary estate as it was a bequest to "charity". Such a contention is not only denied by the record, but the obvious attempt to inject the "charity" question into the case here, tacitly shows respondents' lack of confidence in sustaining the state courts upon the grounds of their decision. The fact is that counsel for respondent conceded to the Orphans Court that there could be no bequest predicated upon the theory of charity in this case unless it was first established that the abbreviation stood for the name of respondent. Thus, at the opening of the hearing on January 29 the charity argument of respondent was laid to rest in the following manner (R. 257a):

> "By Mr. Clark" (Counsel for respondent): "And third, we shall show by the adjudicated cases, that a Society for the Prevention of Cruelty to Animals, and therefore this Society, or any other, is a charity, and under the will and decisions following the Act of 1855 and its amendments, the heirs have no standing to question the legacy."

After Mr. Clark stated his proposition he then argued to the Court (R. 265a):

> "* * * As to the third point, I don't intend to argue long. If the meaning of the words 'S. P. C. A.' once is conceded to be The Society for the Prevention of Cruelty to Animals, then that is a charitable bequest, and whether we or any one else are entitled, the heirs have no standing to question it."
>
> "By the Court: Aren't you arguing in a circle?"
>
> "By Mr. Clark: In a way."

"By the Court: If the identity is established, it belongs to your client."

* * * (R. 266a):

"By the Court: I am assuming that The Pennsylvania Society for the Prevention of Cruelty to Animals is a charity. Now until you establish that The Pennsylvania Society for the Prevention of Cruelty to Animals is the object of this bequest, *then you haven't established it is a charity.*"[2]

"By Mr. Clark: You are entirely right. * * *"

Respondent never again mentioned charity at any time during the proceedings. In answer to exception 43 of petitioners, the Orphans Court found (R. 452a):

> "There is nothing in the Will or Codicils to imply or impute a charitable use to the residuary estate, apart from an inference *predicated wholly and entirely upon the prior identity of a residuary legatee as one whose powers and purposes are purely and solely charitable.*"

In view of the record in this case, we again assert, as we asserted in the Petition (Pet. p. 23), that the argument predicated upon a "charity" of respondent (Br. pp. 11, 12) is specious and is an attempt to lift the case by its proverbial "boot straps".

In this section of respondent's argument, respondent takes the position that it offered the evidence described on pages 13 through 15 of its Brief, not only to inform the mind of the Court and to assist the court in taking judicial notice, but as affirmative proof and would have this Court believe that such evidence was actually admitted in evidence and was not subject to the provisional ruling of the Orphans Court reserved throughout the hearings, which commenced on January 29.

We make the flat statement that every exhibit listed on

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[2] Italics ours unless otherwise indicated.

pages 13 through 15 and the exhibits described at the bottom of page 17 of respondent's Brief were all provisionally received by the Orphans Court (R. 266a, 267a, 269a, 274a-278a, 287a, 297a-298a). All of this so-called "evidence" was taken *provisionally* by the Orphans' Court with a clear understanding that it would later announce whether or not this evidence, and any other evidence offered by respondent, was admissible. The court even went so far as to state that when it announced its decision, if it should decide the evidence was inadmissible, it would strike it from the record.

Counsel for petitioners at the opening of the hearings (R. 266a) made it perfectly plain to the Court that petitioners objected to the introduction of any evidence on behalf of the claimant, and requested an offer of proof. The court granted the request for an offer of proof and respondent offered to prove that it was the legatee designated in the residuary clause, and that it was frequently referred to as "Penna. S. P. C. A." and made such offer "solely for purposes of identification" (R. 267a). Whereupon the court ruled that it could not allow any proof that respondent was the beneficiary intended, but that the court would allow respondent to produce evidence concerning the identity of respondent, ruling that such evidence would be received under objection and with the understanding that the court would rule upon its admissibility "on review" and when it made its decision if the evidence was improperly received it would be stricken from the record (R. 267a).

It is perfectly plain of record that this provisional ruling of the court was made applicable to all evidence offered *by respondent* because counsel for petitioners asked that it be "understood for the record that the general objection * * * to this testimony * * * to the introduction of *all* this testimony * * * applies to each and every

question' and the Court ruled it was so understood (R. 269a).

After listing as *in evidence* the exhibits offered at the hearing on January 29, respondent argues (Br. p. 16) that the conclusion of that hearing shows that the case was concluded and closed. That statement is not borne out by the record because a further hearing was held on February 21, 1942, at which time *further* testimony was taken and the court ordered the taking of certain depositions (R. 308a-310a).

Respondent further argued (Br. p. 16) that because it was stated at the close that day of the hearing of January 29, by petitioners' counsel "We have no more evidence" that petitioners recognized that the case was concluded. As we have demonstrated above, that certainly is not the case and the statement of petitioners' counsel, which was clearly understood by the parties and the court at the time it was made, merely meant that they had no further testimony to present in the then-stage of the proceeding. The hearings certainly were not closed. Further hearings were held on February 21 (R. 307a) and March 7, 1942 (R. 316a) and without motion to reopen. A mere reference to the docket entries (R. 5a) will demonstrate that the hearings which commenced on January 29, 1942, were open up to the very day of the court's adjudication *nisi*.

Moreover, it is perfectly plain that all parties considered the hearings open, as a stipulation (R. 328a) was filed on the very day the court entered its adjudication (R. 5a), and still without any motion to reopen.

The fact that the Trust Instrument was never introduced, or that the trust estate was never mentioned at any of the three hearings held in this proceeding, clearly shows that no one regarded the case as concluded.

Another fact which demonstrates clearly that the parties realized that the hearings were open, is that under the prac-

tice of the Orphans Court, before an adjudication *nisi* is entered, Requests for Findings of Fact and Conclusions of Law are filed with the trial judge. Yet neither side had filed such requests as of the date the court filed its adjudication *nisi*. That petitioners were taken completely by surprise is borne out by the fact that on the following Tuesday, March 17th, they petitioned to annul the adjudication *nisi* (R. 358a-364a) and pointed out that the court had specifically reserved decision upon the admissibility of respondent's evidence and until the court ruled upon the admissibility of that evidence, and whether or not any evidence would be received, it was not incumbent upon them to offer any evidence. Petitioners asked the right to put in evidence in support of their case, and further asserted that even if the court should deem that it was justified in taking judicial notice, still the next-of-kin must have the right to be heard upon what inferences could be drawn from the exercise of judicial notice (R. 359a-360a-361a). Specific offers of proof were made in support of petitioners' demand to be heard (R. 363a-364a). The court, as we pointed out in our Petition, denied the petitioners any right whatever to put in any evidence upon the theory that once the court took judicial notice, it would not receive evidence contrary to the inferences drawn *by the court* from that judicial notice (R. 366a), *and this, notwithstanding the fact, that the court "used" the evidence offered by respondent to inform the mind of the judge, which very evidence the court held was "inadmissible"* (R. 366a). On the announcement of this "unique" decision, petitioners vainly, by timely motions, again sought the opportunity to be heard, which culminated in the trial court holding open all findings of fact or conclusions of law and all errors, omissions and questions with reference thereto for determination upon final adjudication (R. 370a).

Thereupon petitioners filed their exceptions to the action of the trial court, pointing out that the decision was based upon an incomplete record as evidence had not been received under the offers of proof made by petitioners, that the Trust Instrument attempted to be construed was not in evidence and therefore its provisions could not have been lawfully known to the court, (R. 428a-430a, 431a), and that the actions of the trial court had deprived petitioners of due process of law (R. 435a-436a).

These Federal questions were assigned as errors (R. 499 to 505), and argued in the Supreme Court of Pennsylvania but were ignored by that court in its opinion.

Reply to Point 2 of Respondent's Argument.

In this section of its Brief (Br. pp. 17-21) respondent argues that petitioners had full opportunity to be heard in the Orphans Court. In the light of what has been pointed out in the Summary Statement of our Petition and our reply *supra,* to other sections of the respondent's Brief, little need be said in reply to this contention. The facts in this case show that the question of the admissibility of any evidence concerning the ambiguous residuary clause here involved was not ruled upon by the trial court, but was reserved for decision after review. Throughout proceedings which were open up to the very day the court announced its adjudication, it had announced no decision on the reserved question of law. Counsel for petitioners, in all honesty, withheld their proofs which would have emphasized the patency of the ambiguous residuary clause, until the court ruled on the question of whether any proof was admissible. The announcement of the court on the "admissibility" of any evidence was made in its adjudication *nisi* of March 14, 1942. And instead of ruling squarely on the question of the admissibility of evidence, the court

took the novel position that it could use respondent's evidence *even though inadmissible*, to inform the mind of the *judge*, and being thus "informed," could then judicially notice the ultimate fact in issue in favor of respondent, and could deny to petitioners the right to produce any evidence either to inform the mind of the judge, or concerning the ambiguous residuary clause, or to rebut the evidence offered by respondent, or to explain or rebut the inferences to be drawn from the exercise of judicial notice. Such a situation, in our opinion, involves a decision based upon an improper and incomplete record, a denial of a fair trial, and a denial of due process of law to petitioners.

In such a situation, we think little need be said of the argument of respondent that petitioners were afforded "full opportunity to be heard." We submit that the converse is true, and, in fact, petitioners were afforded no opportunity to be heard.

This aspect of the case is fully covered by the decision of this Court in the case of *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292. While this case is cited by respondent in support of its position, we submit that it squarely upholds the right to certiorari here and requires a reversal of the courts below. In the *Ohio Bell Telephone Co.* case, the Commission did precisely what the Orphans Court did in the case at bar and utilized judicial notice to support the findings made by the Commission adverse to the Telephone Company. In the *Ohio Bell Telephone Co.* case, as basis for an order requiring the Telephone Company to refund to its patrons excess earnings collected during a series of years, the Commission valued the Company's property for each of those years by applying to the value in an earlier year, which it had determined on hearings, price trend percentages, derived through judicial notice from evidence which had been provisionally received. As pointed out by this Court (p. 296) the Commission for valuation purposes

"took judicial notice of price trends during those years", and, as in the case at bar, the first warning from the Commission that it would exercise judicial notice in connection with such facts came with the filing of its report. In the case at bar, the first warning that the court would exercise judicial notice of the ultimate fact in issue came with the filing of its adjudication *nisi*.

In the *Ohio Bell Telephone Co.* case, as in the instant case, the Company protested and moved for a re-hearing and asked the opportunity to explain the facts judicially noticed and to rebut them. As here, the Company was denied the opportunity to explain and rebut the facts judicially noticed. This Court held (pp. 299-300), in the *Ohio Bell Telephone Co.* case, that the demand of the Telephone Company for the opportunity to explain and rebut the facts judicially noticed by the Commission was a "timely and adequate assertion of the infringement of the petitioners' rights under the Fourteenth Amendment."

It was argued that the decision of the Commission could be upheld and the Supreme Court of Ohio had upheld the decision on the theory that it could be sustained "as an instance of judicial notice" (301 U. S. 300). This Court rejected that contention in no uncertain terms and pointed out (p. 301) that this Court's "opinions have been much misread if they have been thought to point that way." This Court then squarely ruled (p. 301) that judicial notice even when exercised "has no other effect than to relieve *one* of the parties to a controversy of the burden of resorting to the usual forms of evidence" and further (pp. 301, 302) "it does not mean that the opponent is prevented from disputing the matter by *evidence* if he believes it disputable."

In conclusion, this Court pointed out that to press the doctrine of judicial notice to the extent attempted in the *Ohio Bell Telephone Co.* case, and we submit in the instant

case, (p. 302) "would be to turn the doctrine into a pretext for dispensing with a trial."

As this Court pointed out (p. 302) in the *Ohio Bell Telephone Co.* case, judicial notice seems to have expanded "beyond reasonable limits" and from a standpoint of due process, all facts upon which an exercise of judicial notice is based, must be *in evidence* in order to protect the individual against "arbitrary action."

The conclusion we draw from the decision of this Court in the *Ohio Bell Telephone Co.* case, is that if judicial notice is to be exercised and facts thereon found, then all facts of both sides upon which the exercise of judicial notice is predicated must be in evidence, otherwise hearings and appeals could be no more than empty forms, as no one could determine upon what the exercise of judicial notice was based. We submit that this Court has "served notice" upon our courts that judicial notice is not to be perverted into a substitute for trial.

In the instant case, the Orphans Court announced in its adjudication *nisi* on March 14th *for the first time* that while it would not receive evidence generally, that it would receive respondent's inadmissible evidence to inform the mind of the judge and would then judicially notice the ultimate fact in issue. We say that such a practice is condemned as a denial of due process by this Court in the *Ohio Bell Telephone Co.* case and in the case of *Shapleigh* v. *Mier,* 299 U. S. 468.

Reply to Point 3 of Respondent's Argument.

It would serve no point to discuss this section of respondent's argument. The one case cited dealing with abbreviations, *Gilman* v. *Sheets,* 78 Iowa, 49, 43 N. W. 299, actually supports petitioners' contentions.[3]

[3] For other cases dealing with abbreviations and judicial notice see: *Stein* v. *Meyers,* 253 Ill. 199; *Accola* v. *Chicago, Burlington & Quincy Ry. Co.,* 70 Iowa 185; *Van Heusen* v. *Argenteau,* 194 N. Y. 309.

Reply to Point 4 of Respondent's Argument.

This section of respondent's Brief argues that no Federal question is presented. After making that bold statement, no attempt whatever is made by respondent to uphold it except to cite certain cases which have no bearing on the questions here involved. In the instant case, the Federal questions here presented were raised as soon *as they came into being* in the trial court. Exceptions thereon were duly filed and assignments of error thereon were duly made in the Supreme Court of Pennsylvania. In the face of such a record, we can well appreciate why respondent makes no attempt to sustain its "assertion" that no Federal questions are presented in this case.

Reply to Point 5 of Respondent's Argument.

In this section of respondent's Brief (Br. pp. 22-26) respondent charges that "many of the statements in the Petition are erroneous and carry a false implication." Respondent then cites certain statements from the record which it contends supports this serious charge. We submit that the charge is unfounded as we will now demonstrate by the record.

Respondent refers to a statement on page 7 of the Petition which reads:

> "When the court announced it would consider evidence petitioners then asked to be permitted to put in evidence on their own behalf and on rebuttal (without petitioners abandoning the rights reserved on their exception that no evidence was admissible as the ambiguity here involved was patent)."

Respondent then states that from this statement it would appear that petitioners asked and were not permitted to introduce evidence as to the meaning of the residuary clause at "the hearing" and then argues that the record shows the

contrary, citing a statement (at R. 308a) of petitioners' counsel, "We have no more evidence", and a further statement that an attorney for one of the petitioners desired to enter his appearance "in the record while it is open."

As we have pointed out earlier in this Reply, there were in fact *three* hearings. At the hearings, which *commenced* on January 29, 1942, petitioners withheld their evidence which would emphasize the patency of the ambiguous residuary clause and the circumstances surrounding the making of the Will in question, because there was no point in even offering such evidence until the court ruled on the basic question involved in the case of whether *any* evidence was admissible and whether the evidence offered provisionally by respondent was admissible. The record clearly shows that the court reserved its ruling on this vital question and advised petitioners that it would announce its ruling on the reserved question after a review of the evidence, respondent's whole case, and if it determined such evidence inadmissible it would be formally stricken from the record. In such a situation petitioners were open to the very day the court announced its decision know what, if any, evidence of respondent they would be required to meet. Thus, if all of respondent's evidence were stricken, and the ambiguity was held patent, all questions would have been resolved without any evidence whatsoever from petitioners and a decision in their favor would automatically follow.

It is perfectly plain from the record that the hearings were open to the very day the court announced its decision *nisi* and that that decision *itself* raised the Federal questions here involved. Within three days after the announcement of the court's decision, petitioners petitioned to annul the adjudication *nisi* (R. 361a) and filed supporting offers of proof. And the court did *thereupon* rule that it would not receive petitioners' evidence and that

it would have been rejected in the first instance if offered. But it nevertheless took the position that it would receive and consider respondent's evidence, and *thereupon* ruled again that it would judicially notice that the abbreviation meant respondent (R. 366a). We submit the statement on page 7 of our Petition is an accurate statement of what the record discloses.

Respondent criticizes (Br. p. 24) another statement on page 7 of the Petition which alleges that petitioners' position was that until the court ruled whether any evidence would be admitted they would withhold all evidence to emphasize the patency of the ambiguous residuary clause. We submit that petitioners' position was plain and was clearly pointed out to the Orphans Court in their petition to annul the adjudication *nisi* which adjudication contained the *first ruling* on the admissibility of any evidence in this case (R. 358a-362a). Of course, the petition to annul the adjudication was filed after the court filed its adjudication *nisi*. We do not understand how any one could have raised any Federal questions prior to this time, as they did not arise in the case *until the filing of the decision and adjudication nisi on March 14, 1942.*

Respondent makes the further statement (Br. 25) that an examination of the notes of the testimony shows that there was no question reserved by the court, except the right to strike out evidence received which the court might later determine to be inadmissible. We submit that this statement is highly misleading. The fact of the matter is that the admissibility of any and all evidence of respondent was taken under advisement by the court with the announcement that it would later determine on review of respondent's whole case whether the evidence was admissible or inadmissible, and if inadmissible would strike it from the record. The adjudication *nisi* contained the

first announcement by the court that related in any way to the admissibility of any evidence whatsoever in this case.

Respondent questions (Br. p. 26) th estatement of petitioners that the Orphans Court recognized that the residuary clause here involved was ambiguous. We submit that one cannot read this record, particularly the opinions of the Orphans Court, without arriving at the conclusion that the court was of the opinion that this was an ambiguous residuary clause. The ambiguity in the residuary clause delayed distribution in this case even before petitioners sought a construction of the Will and that ambiguity colors every action taken by the Orphans Court in this case.

A further statement made in this section of the argument (Br. p. 26) is that there is nothing in this record to show that the judge and the respondent agreed with each other that there was nothing in the Will upon which to predicate a charitable use. Let us see if there is such an "agreement" in the record:

Respondent's sole argument concerning the "charity" contention appears on pages 265a and 266a of the record. There respondent's counsel said:

> "If the meaning of the words 'S. P. C. A.' once is conceded to be The Society for the Prevention of Cruelty to Animals, then that is a charitable bequest and whether we or any one else are entitled, the heirs have no standing to question it."
>
> "By the Court: Aren't you arguing in a circle?"
> "By Mr. Clark" (counsel for respondent): "In a way."
>
> * * * * * * *
>
> "By the Court: I am assuming that The Pennsylvania Society for the Prevention of Cruelty to Animals is a charity. Now until you establish that The Pennsylvania

> Society for the Prevention of Cruelty to Animals is the object of this bequest, then you haven't established it is a charity."
>
> "By Mr. Clark: You are entirely right. * * *"

If this is not an *agreement* between the judge and counsel, that there is nothing in the Will upon which to predicate a bequest to charity, then it is a little difficult for us to understand the English language. In keeping with this agreement, the court squarely held (R. 452a) that there is nothing in the Will or Codicils to imply or impute a charitable use.

Petitioners pointed out in their Petition that the trial court actually awarded *nisi* a trust estate of $396,448.21 (Pet. 4, 7-8, 13, 18-19) to respondent, without the trust instrument being in evidence or before the court, *without* the court having *read* the trust instrument, and without petitioners being heard thereon. Nowhere does the respondent deny the correctness of that statement. Respondent's "Argument" *does not even mention the trust estate.* The sole reference thereto is in the last two paragraphs of its "Statement of the Case" which does not even imply a challenge to the correctness of the Petition, but significantly says (Br. pp. 6-7):

> "* * * The Orphans Court *of Philadelphia County* * * * awarded the *balance* to * * * executors, to be segregated from her individual estate and accounted for by them as a separate fund. *The* Orphans' Court held that this trust fund passed under her will as a part of her estate. *This holding was made and an opinion filed on motion of the next of kin to open the adjudication* (R. 367a)."

Thus, if the Court is to believe respondent's Brief, this holding was "irregular" (Br. p. 23) because made after the hearing was "concluded" and with no evidence whatsoever before the court concerning the trust estate.

The Philadelphia Court made no award of the trust estate to the executors to be administered as a part of the residuary estate, which is the inference respondent is attempting to have this Court draw from its Statement of the Case. The Philadelphia Court, on the contrary, awarded *custody only* of the trust estate to the executors, expressly providing that the trust estate was not to be commingled with the general residuary estate, as its order provided that the trust estate was "to be held segregated from her individual estate and accounted for as a separate fund" (R. 23a).

In its adjudication *nisi*, the Orphans Court of Tioga County had "tucked away" into Finding of Fact No. 3 the statement that the trust estate (R. 332a):

> "upon her death became part of her general estate. No question as to the status of the trust fund arises here, as all the assets therein have been *awarded* to and are in the hands of the executors as such."

As there had been no award of the trust estate prior to the adjudication *nisi*, petitioners pointed that fact out to the court and challenged this "holding" in the adjudication *nisi* (R. 361a).

The Orphans Court of Tioga County, realizing that petitioners' contentions concerning the trust estate were well taken, then *changed its position* by attempting to impute that the "award" meant by that court in its adjudication *nisi* was made by the *auditor* (R. 367a) and then said, *without the trust instrument ever having been introduced in evidence*, that it provided that

> "* * * at her death (trust) to be distributed to such persons as she should by will appoint. She *made no appointment* and the trust * * * *therefore* on her death passed under her will * * *" (R. 367a).

Petitioners then pointed out to the court that the position that an award had been made by the auditor was untenable,

as the auditor has specifically refrained from attempting to determine what comprised the "residue" of decedent's estate and merely "felt" that it would be expedient to combine the trust account and the account on decedent's individual estate without any pretext of making an award to the parties entitled (R. 136a).

On the holding of the court that decedent *did not include the trust estate* in the terms of her Will, petitioners are entitled to that trust estate.

Accordingly, exceptions on this aspect of the case were duly filed and in response to Exception No. 7 (R. 478-479) the court changed its position again and pitched its entire holding on the order of the Orphans Court of Philadelphia as an "award" of the trust estate. Such a position is untenable, as we have shown. The result is that the Orphans Court, no matter on what theory it pitched its "adjudication," did so without the trust instrument ever having been introduced in evidence and without petitioners ever having been heard thereon. In fact the court in its attempt to sustain its initial action, actually switched its grounds from "pillar to post", and respondent shows its recognition of this condition in the poignancy of the last sentence of its "Statement of the Case" (Br. p. 7).

The singular silence of respondent's Brief upon the unconstitutional manner in which the Orphans Court awarded the trust estate to respondent, and its similar silence concerning respondent's collusive collaboration with the Women's Pennsylvania Society for the Prevention of Cruelty to Animals, to eliminate the patent ambiguity here involved, as alleged in the Petition (pp. 16-17), concede the weaknesses of respondent's case.

Conclusion.

In conclusion, it is submitted that this case involves substantial Federal questions; that those questions are im-

portant and go to the very root of our constitutional concepts of a fair trial and due process; that those questions were timely raised and should be decided by this Court in the public interest to preserve the purity of our Judicial system, and that the Petition for a Writ of Certiorari should be granted and that the decision of the court below should be reviewed and reversed.

Respectfully submitted,

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